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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. OSCAR SAINZ, Appellant.	)	2 CA-CR 2009-0122 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF SANTA CRUZ COUNTY

Cause No. CR-08-064

Honorable Kimberly A. Corsaro, Judge Pro Tempore

AFFIRMED

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H O W A R D, Chief Judge.

¶1 Following a jury trial, appellant Oscar Sainz was convicted of one count of possession of marijuana for sale. He was sentenced to five years in prison. Sainz raises numerous issues on appeal. For the reasons that follow, we affirm.

Facts and Procedural History

¶2 "We view the facts in the light most favorable to sustaining the conviction[]." *State v. Robles*, 213 Ariz. 268, ¶ 2, 141 P.3d 748, 750 (App. 2006). Law enforcement officers received information that a home, occupied by Sainz, was being used as a drug stash house. The officers went to the house and knocked on the door, but no one answered. Sainz's wife subsequently arrived, opened the door to the house, and motioned for the officers to come inside. When the officers entered the home, they discovered Sainz near the front door.

¶3 The officers informed Sainz why they were there, and Sainz consented to a search of the house. The officers searched the home and also asked Sainz to open a locked shed that was attached to the house. Officers found seventy-two bundles of marijuana inside the shed.

¶4 Sainz was charged with and subsequently convicted of one count of possession of marijuana for sale. This appeal followed.

Jury Selection

¶5 Sainz argues the trial court committed structural error by refusing to strike two prospective jurors for cause during voir dire. However, although Sainz never makes this clear, the two prospective jurors did not actually sit on the jury because Sainz used

two of his peremptory strikes to remove them. Thus, his argument is not that the jury was impartial, as he seems to be suggesting in his opening brief, but rather that the jurors should have been removed from the panel and because they were not, he was unfairly required to use his peremptory strikes in order to have them removed. "A defendant's use of peremptory strikes to remove prospective jurors who should have been removed for cause is subject to harmless error review[, and r]eversal is not required if a fair and impartial jury was empanelled." *State v. Garza*, 216 Ariz. 56, ¶ 32, 163 P.3d 1006, 1015 (2007) (citation omitted). Sainz has not argued, much less established, that the jury impaneled was not fair and impartial. Thus, we will not reverse his conviction on this ground.

Profile Evidence

¶6 Sainz next argues that his conviction should be reversed due to the admission of improper profile evidence. We review the admission of evidence for abuse of discretion. *State v. Pandeli*, 215 Ariz. 514, ¶ 41, 161 P.3d 557, 570 (2007). However, in order to preserve an issue for appeal, an objection must be made below. *See State v. Hamilton*, 177 Ariz. 403, 408, 868 P.2d 986, 991 (App. 1993). Sainz points to several instances in which improper profile evidence purportedly was admitted. We do not address those to which there was no objection. The trial court sustained one of Sainz's objections. The court's ruling on one of his other objections does not appear in the transcript. Consequently, for the purposes of this discussion, we will assume that objection was overruled.

¶7 Of the three objections Sainz made, two were on speculation grounds and one was for insufficient foundation. But none was based on the inadmissibility of profile evidence. "And an objection on one ground does not preserve the issue [for appeal] on another ground." *State v. Lopez*, 217 Ariz. 433, ¶ 4, 175 P.3d 682, 683 (App. 2008).

¶8 Relying on *Beijer v. Adams ex rel. County of Coconino*, 196 Ariz. 79, ¶¶ 2-14, 993 P.2d 1043, 1044-46 (App. 1999), Sainz contends the lack of an appropriate objection in the trial court is not fatal because the defendant in that case did not object at all. But the defendant in *Beijer* was not challenging the trial court's rulings on the admissibility of profile evidence; the trial court had granted a mistrial based on the introduction of the improper evidence. *Id.* ¶ 15. Rather, Beijer had initiated a special action in which the defendant challenged the trial court's denial of his motion to bar a retrial, following a mistrial based on the prosecutor's alleged misconduct and related principles of double jeopardy under Arizona's Constitution. *See id.* ¶ 1. The case is not at all similar to the one before us.

¶9 Therefore, Sainz has forfeited the right to seek relief for all but fundamental, prejudicial error as a result of his failure to object to the admission of the evidence on the ground raised on appeal. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005) (failure to object to alleged error in trial court results in waiver of review for all but fundamental error). Furthermore, because he does not argue on appeal that the error is fundamental, and because we find no error that can be so characterized, the argument is waived. *See State v. Moreno-Medrano*, 218 Ariz. 349,

¶ 17, 185 P.3d 135, 140 (App. 2008) (fundamental error argument waived on appeal); *State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007) (court will not ignore fundamental error if it finds it).

Denial of Rule 20 Motion

¶10 Sainz next contends that the trial court erred in denying his motion for a judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P. Sainz had argued below that there was insufficient evidence that he had known the marijuana was in the shed or had exercised dominion and control over it. A motion for judgment of acquittal should only be granted "if there is no substantial evidence to warrant a conviction." *Id.* And "substantial evidence is proof that reasonable persons could accept as sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *State v. Spears*, 184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996). Substantial evidence "may be either circumstantial or direct." *State v. Henry*, 205 Ariz. 229, ¶ 11, 68 P.3d 455, 458 (App. 2003). We review a denial of a Rule 20 motion for an abuse of discretion, *id.*, and we will reverse a conviction "only if 'there is a complete absence of probative facts to support [the jury's] conclusion.'" *State v. Carlisle*, 198 Ariz. 203, ¶ 11, 8 P.3d 391, 394 (App. 2000), *quoting State v. Mauro*, 159 Ariz. 186, 206, 766 P.2d 59, 79 (1988).

¶11 Sainz was convicted of possession of marijuana for sale. "'Possess' means knowingly to have physical possession or otherwise to exercise dominion or control over property." A.R.S. § 13-105(33). For a defendant to illegally possess drugs, he must have "either actual physical possession or constructive possession with actual knowledge of

the presence of the [drugs]." *State v. Ballinger*, 19 Ariz. App. 32, 35, 504 P.2d 955, 958 (1973). Constructive possession may be established by a showing that the defendant "exercised dominion and control over the drug itself, or the location in which the [drug] was found." *State v. Teagle*, 217 Ariz. 17, ¶ 41, 170 P.3d 266, 276 (App. 2007).

¶12 A defendant need not have "exercised exclusive possession or control over the substance itself or the place in which the illegal substance was found; control or right to control is sufficient." *State v. Curtis*, 114 Ariz. 527, 528, 562 P.2d 407, 408 (App. 1977). But a defendant's mere presence at a location where drugs are found does not establish that the defendant exercised dominion and control over the drugs. *Teagle*, 217 Ariz. 17, ¶ 41, 170 P.3d at 276-77. Moreover, circumstantial evidence is of "'intrinsically similar'" probative value to direct evidence, and "'there is no logically sound reason for drawing a distinction as to the weight to be assigned each.'" *State v. Musgrove*, No. 2 CA-CR 2008-0294, ¶ 7, 2009 WL 4263799 (Ariz. Ct. App. Dec. 1, 2009), *quoting State v. Harvill*, 106 Ariz. 386, 391, 476 P.2d 841, 846 (1970).

¶13 Sainz argues that he had no knowledge of the marijuana in the shed and, therefore, could not have exercised dominion and control over it. In support of this contention, he points to the fact that, despite being the sole occupant of the house during the relevant time period, he was absent from the property for several hours. However, the state produced evidence that the marijuana was in a locked storage shed, that Sainz had access to the shed through a hidden key, and that the shed was on property occupied solely by Sainz during the relevant period. Sainz also did not answer the door when the

police knocked, and he appeared nervous when the officers entered the home. Based on the evidence presented, reasonable jurors could find beyond a reasonable doubt that Sainz constructively possessed the marijuana. The jury is the sole judge of credibility and was not required to believe Sainz's testimony that he did not know the marijuana was in the shed and had nothing to do with it. *See State v. Rivera*, 210 Ariz. 188, ¶ 11, 109 P.3d 83, 85 (2005). Based on the evidence presented, we cannot conclude there was "a complete absence of probative facts" to support the jury's verdict. *See Mauro*, 159 Ariz. at 206, 766 P.2d at 79. Consequently, the trial court did not abuse its discretion when it denied Sainz's Rule 20 motion.

Jury Instructions

¶14 Sainz contends that the trial court committed several errors in instructing the jury. He first asserts that the court should have given the jury an instruction on mere presence "[b]ecause no other instructions adequately covered . . . [the] theory of his defense." "A party is entitled to an instruction on any theory reasonably supported by the evidence." *State v. Rodriguez*, 192 Ariz. 58, ¶ 16, 961 P.2d 1006, 1009 (1998). But as Sainz acknowledges, he did not request this instruction below; therefore, he has forfeited the right to seek relief for all but fundamental error. *See Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607. Sainz argues that the court's failure, sua sponte, to give this instruction resulted in fundamental, prejudicial error.

¶15 Fundamental error is "'error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that

the defendant could not possibly have received a fair trial.'" *Id.*, *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). The defendant has the burden to show both that the error was fundamental and that it caused him prejudice. *Id.* ¶¶ 19-20. To show prejudice, Sainz was required to establish that, absent this error, a reasonable jury could have reached a different conclusion. *See id.* ¶¶ 26-27.

¶16 The jury was instructed that it was required to find that Sainz knowingly had possessed the marijuana in order to find him guilty. If the jury had believed Sainz's testimony and other evidence presented by the defense, it would have been required to find him not guilty, notwithstanding the lack of a mere presence instruction. Therefore, the lack of the instruction, if error at all, was neither fundamental nor prejudicial.

¶17 Sainz further contends the trial court gave confusing instructions regarding circumstantial evidence and the state's burden of proof. He argues the inclusion in the instructions of an explanation of other burdens of proof, coupled with the absence of an instruction on inferences that can be drawn from circumstantial evidence, was confusing. However, Sainz did not object to these instructions at trial, nor did he attempt to clarify or correct them when the trial court gave him the opportunity to do so. Consequently, he has forfeited the right to seek relief for all but fundamental, prejudicial error. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607. But Sainz does not argue the alleged error was fundamental, nor have we found error in this regard that can be so characterized; therefore his argument is waived. *See Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d at 140 (fundamental error argument waived on appeal if not argued);

Fernandez, 216 Ariz. 545, ¶ 32, 169 P.3d at 650 (court will not ignore fundamental error if it finds it).

Sentencing

¶18 Sainz finally argues that the trial court did not give proper weight to mitigating circumstances and therefore erred when it sentenced him to the presumptive prison term.[1] Trial courts have broad discretion in sentencing, and a sentence that is within statutory parameters will not be disturbed absent a clear abuse of discretion. *State v. Cazares*, 205 Ariz. 425, ¶ 6, 72 P.3d 355, 357 (App. 2003). "[A] sentencing court is not required to find that mitigating circumstances exist merely because mitigating evidence is presented; the court is only required to give the evidence due consideration." *Id*. ¶ 8.

¶19 The trial court here did consider the mitigating evidence that Sainz presented. Although it did not ultimately find that his age was a mitigating circumstance, the court did appear to regard Sainz's poor health, his lack of a criminal record, and the testimony from his family to be mitigating circumstances, and the court weighed those circumstances against the aggravating factors, specifically the "gravity and severity of the crime." It was for the court to determine, in the exercise of its discretion, how much weight to give these circumstances, which it clearly did. The court did not abuse its discretion. Thus, we find no error, let alone fundamental error, in its determination that the presumptive prison term, rather than a mitigated term, was appropriate.

[1]The state contends this argument was forfeited because it was not raised below. Because Sainz asked for a mitigated term below, we will consider this issue preserved.

Conclusion

¶20 In light of the foregoing, we affirm Sainz's conviction and sentence.

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

PHILIP G. ESPINOSA, Presiding Judge

GARYE L. VÁSQUEZ, Judge